SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
APR 25 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF OF AMICI CURIAE.

A. L. WIRIN,
ABRAHAM GORENFELD,
BASIL FEINBERG,
FRED OKRAND,
EVERETTE PORTER,
SABURO KIDO,
DAVID ZISKIND,
GEORGE E. BODLE,

Suite 416 Douglas Building,
257 South Spring Street,
Los Angeles 12, California,

Counsel for Amici Curiae.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

SUBJECT INDEX

PAGE

Statement of interest of amici curiae 2

Summary of the argument 3

Argument 4

I.

Since respondent's rights are directly and immediately involved in this litigation, she may properly raised the constitutional issues 4

A. The right to the sound development of the whole community 4

B. The right to dispose of her property 12

II.

Public policy of the State of California inhibits the use of the State's courts to enforce this agreement 13

III.

The State Court may properly raise an objection of public policy or constitutional violation sua sponte 16

Conclusion 20

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adler v. Deegan, 251 N. Y. 467, 167 N. E. 705	5
Barrows v. Jackson, 112 Cal. App. 2d 534	14
Beasley v. Texas & P. R. Co., 191 U. S. 492	17
Buchanan v. Warley, 245 U. S. 60	12
Day v. Metropolitan Life Ins. Co., 11 Cal. App. 2d 681; cert. den., 299 U. S. 560	20
Doherty v. Bartlett, 81 F. 2d 920; cert. den., 298 U. S. 676	16
Endicott v. Rosenthal, 216 Cal. 721	16
Fairchild v. Raines, 24 Cal. 2d 818	4, 8
Fewel & Dawes v. Pratt, 17 Cal. 2d 85	16
Henderson v. United States, 339 U. S. 816	6
Hurd v. Hodge, 334 U. S. 24	12, 13
James v. Marinship, 25 Cal. 2d 721	14, 15
Kessler v. Jefferson Storage Corp., 125 F. 2d 108	16
Marsh v. Alabama, 326 U. S. 501	12
Massachusetts v. Mellon, 262 U. S. 447	18
Meyer v. Nebraska, 262 U. S. 390	9
Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261	16
Pacific Wharf & Storage Co. v. Standard American Dredging Co., 184 Cal. 21	16
Perez v. Sharp, 32 Cal. 2d 711	5
Phillips v. Naff, 332 Mich. 389, 52 N. W. 2d 158	12, 13
Pierce v. Society of Sisters, 268 U. S. 510	9, 10
Shelley v. Kraemer, 334 U. S. 1	1
Steele v. Drummond, 275 U. S. 199	16
Sweatt v. Painter, 339 U. S. 631	11
Thornhill v. Alabama, 310 U. S. 88	19

PAGE

Truax v. Raich, 239 U. S. 33 10

Walker v. Harbor Realty & Development Co., 214 Cal. 46 16

Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 286 ..... 14, 15

STATUTES

Revised Rules of the United States Supreme Court, Rule 27 (9)(a) 1

United States Constitution, Fifth Amendment 13

United States Constitution, Fourteenth Amendment 2, 3, 8, 11, 20

United States Revised Statutes, Sec. 1978 13

TEXTBOOKS

Annals of the American Academy of Political and Social Science, May, 1951, p. 14 7

6 California Jurisprudence, Sec. 107, pp. 153-154 17

Chafee, Freedom of Speech in the United States (1941), p. 34 20

16 Corpus Juris Secundum, p. 164 20

17 Corpus Juris Secundum, Sec. 279, p. 669 16

17 Corpus Juris Secundum, Secs. 279-280, pp. 668-669 16

17 Corpus Juris Secundum, Sec. 281, p. 670 16

Dollard, Caste and Class in a Southern Town, p. 73 6

26 Journal of Psychology, pp. 261, 267, Deutscher and Chein, The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion 6

Moton, What the Negro Thinks, p. 5 6

1 Myrdal, An American Dilemma, pp. 643-644 6

Weaver, The Negro Ghetto, p. 270 6

IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF OF AMICI CURIAE.

Counsel for *Amici Curiae,* by consent of the parties hereto, have filed this brief, pursuant to rule 27(9)(a) of the revised rules of the Supreme Court of the United States, in support of the decision of the court below. They are concerned with the attempt being made to restrict the scope of this Court's decision in *Shelley v. Kraemer,* 334 U. S. 1. The organizations that join in this brief are as follows:

American Civil Liberties Union (Southern California Branch).

Los Angeles International Ladies' Garment Workers' Union.

Greater Los Angeles C. I. O. Council.

National Association for the Advancement of Colored People.

Japanese American Citizens' League.

Los Angeles Urban League.

Southern Division, California Cooperative League.

The Christines.

Jewish Labor Committee.

Los Angeles District Council, Jewish War Veterans, U. S. A.

Eagle Rock Council for Civic Unity.

Los Angeles Central Labor Council.

Statement of Interest of Amici Curiae.

The interest of the undersigned organizations and persons in this litigation arises by reason of their belief that there is explicit and implicit in the issues herein grave constitutional questions dealing with the Fourteenth Amendment. Moreover, they are interested and committed to the maintenance of the proposition that all men are created equal and that no state action can be asked to enforce agreements based upon terms of race or color.

Again, they perceive in this litigation important questions of public interest in the congestion of limited residential districts for non-white people, arising as a consequence of compulsory residential segregation. It seems to them also that this case raises the query as to whether an owner of property may be deprived of one of its essentials elements,—the right to dispose of it to a constitutionally qualified purchaser.

Summary of the Argument.

I.

Respondent's rights are directly and immediately involved in this litigation. These rights, including the right to the sound development of the whole community and the right to dispose of property, are protected by the Fourteenth Amendment against judicial action directed toward maintenance of segregation. Such rights cannot achieve full and complete expression where segregation exists. Rights of whites and Negroes are inseparably connected. They are two sides of the same coin. What affects one inevitably affects the other.

II.

Public policy of the State of California denies the use of the courts to enforce agreements designed to promote segregation. There is a clear public policy against discrimination based on race or color. Although the state recognizes such agreements as valid and permits voluntary adherence thereto, it denies the use of its courts for enforcement. An integral part of the public policy against discrimination is the refusal of the state to give active support to segregation agreements.

III.

Even conceding for the purpose of argument that no rights of Respondent are here involved, the state court may properly consider the rights of the Negro population. This is particularly true on the basis of public policy, where the courts have traditionally considered the interests of persons not before it. It is also true where only constitutional (Fourteenth Amendment) objections are involved, because in this case the court is not passing on the validity of a legislative enactment but is being solicited to act affirmatively. On the analogy of the free speech cases, the court may properly consider the social interests involved and need not limit itself to the rights of the particular litigants.

ARGUMENT.

I.

Since Respondent's Rights Are Directly and Immediately Involved in This Litigation, She May Properly Raise the Constitutional Issues.

A. The Right to the Sound Development of the Whole Community.

Counsel for Petitioners and St. Louis *Amici* have asserted as one of their central arguments the proposition that the "Respondent has no standing in this court to protect or assert the rights of the Negro occupants of the real property concerned." This argument ignores the fact that Respondent, although of the white race, has rights and interests of her own which are directly and immediately involved in this litigation.

Residential segregation is harmful not only to the Negroes who are segregated but also to members of the community at large. The social evils resulting from segregation inevitably affect the surrounding community. This view was forcefully expressed by Mr. Justice Traynor of the Supreme Court of California in his separate concurring opinion in *Fairchild v. Raines*, 24 Cal. 2d 818, 834, where he declared that:

"Negroes migrating into urban communities have found barriers at every turn. 'Segregation . . . has kept the Negro occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and plague spots for race exploitation, friction, and riots.'" (Report of the Committee on Negro Housing of the President's Conference on Home Building and Home Ownership, pp. 45 and 46.) The choice lies between the con-

tinuance of such conditions and the expansion of urban Negro districts. Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the *sound development of the whole community*. The courts, as the agencies of the state confronted with the problem of enforcing racial zoning by private agreements, must consider all of the factors that affect the public interest. It is pertinent to recall the words of Judge Cardozo in his concurring opinion in *Adler v. Deegan*, 251 N. Y. 467, 484 (167 N. E. 705, 711): "The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwelling of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole state. Here is to be bred the citizenry with which the state must do its work in the years that are to come. The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women . . . . If the moral and physical fibre of its manhood and womanhood is not a state concern, the question is, what is?"

Further judicial recognition of this view is found in *Perez v. Sharp*, 32 Cal. 2d 711, 725, where the Court stated:

> "The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice."

Not only is segregation detrimental to the Negro and white citizens involved, but it is also injurious to the

interests of the nation as a whole. The effect of segregation is to keep the races apart and to prevent them from knowing each other. Lack of knowledge leads to suspicion, distrust and conflict and results in further demands for segregation. Thus, a vicious cycle is created, and instead of a unified nation we have a divided one. Such a divided nation is at a disadvantage in its attempt to meet the serious international problems with which we are today confronted.

Such judicial declarations are based upon the findings made over a period of years by sociologists and psychologists[1].

> "Segregation and discrimination have had material and moral effect on whites, too. Booker T. Washington's famous remark that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers." (Myrdal, *An American Dilemma*, vol. I, pp. 643-644.)
>
> "Those who segregate others soon become frightened, insecure people forced to accept and invent prejudice to justify their actions. They become hypocrites who either close their eyes to stark reality or invent slogans to hide fundamental issues. The master classes, no less than the subjected, become victims of the system." (Weaver, *The Negro Ghetto*, p. 270.)[2]

---

[1]Deutscher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 261, 267.

[2]See, also, Moton, *What the Negro Thinks*, p. 5; Dollard, *Caste and Class in a Southern Town*, p. 73; Brief of the United States, pp. 55-56, in *Henderson v. The United States of America*, 339 U. S. 816, in which this position is very forcefully presented and supported by numerous authorities.

Where people of different races are free to live and work together, prejudices disappear. They learn to appreciate each other's merits. This has been the experience in housing projects, in the army and in factories.

> "That living or working together on a plane of equality results in the lessening of prejudice was demonstrated by the experiences in the Detroit race riot of June 21, 1943. Although this bloody riot raged through the entire city, competent observers reported no untoward incidents in mixed neighborhoods where whites had lived alongside of Negroes, in the Detroit war factories where integrated employment was the rule, or in Wayne University, in the heart of Detroit, where Negro and white students continued their classes without any friction." (*Annals of the American Academy of Political and Social Science*, May 1951, p. 14.)

These remarks are particularly applicable to the situation in Los Angeles County, in which the present litigation arises. As early as 1944, Mr. Justice Traynor noted the problem arising in this area as a result of the steady migration of southern Negroes.

> "It must be recognized that the steady migration of southern Negroes and the influx of Negroes into urban communities in response to the increasing demands of industry for labor, together with race segregation (see Kennedy, the Negro Peasant Turns Citywards, ch. II, The Causes of Migration, p. 41; Woofter, Negro Problem in Cities, ch. II, The Rapid City Growth, p. 26; Sterner, The Negro's Share, A Study of Income, Consumption, Housing, and Public Assistance, pp. 186-209; Martin, Segregation of Negroes, 32 Mich. L. Rev. 721), have made it impossible for many Negroes to find decent

housing in large centers of population. The report of the Committee on Negro Housing of the President's Conference on Home Building and Home Ownership (1932) page 3, states: 'Cities of the North . . . have shown increases ranging from 10 to 600 per cent. Chicago's Negro population in 1910 was 44,103; in 1930 it had increased to 233,903. Philadelphia's increased from 84,459 in 1910 to 219,599 in 1930, and that of New York . . . from 91,709 to 327,706.' In recent years there has been a large Negro migration into Southern California. The census of 1940 shows an increase of the colored population of Los Angeles from 67,348 in 1930 to 97,847 (Statistical Abstract of the United States, 1942, 78th Congress, 1st Sess., House Document No. 53, p. 20), and the war has accelerated the pace of this migration."

Fairchild v. Raines, supra, pp. 833-834.

Respondent does not live in a social vacuum. The social evils of crime, juvenile delinquency, disease and racial conflict which are the inevitable results of segregation cannot be contained within the Negro ghetto. With explosive force these evils break through the walls and affect the surrounding community in which she lives.

An award of damages against Respondent must necessarily discourage other white sellers from breaching restrictive covenant agreements. The end result is the perpetuation of the ghetto system and its attendant evils. Such judicial action is state action affecting Respondent's rights as well as the rights of the Negro purchasers, and is prohibited by the Fourteenth Amendment.

In *Meyer v. Nebraska*, it was stated that:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man." (262 U. S. 390, 399.)

The liberty thus defined cannot be effectively secured without a sound system of community relations. The rights enumerated cannot be considered in abstraction, but only with reference to the specific social environment in which Respondent lives.

Interrelationships of this character are similar to those considered by the court in *Pierce v. Society of Sisters*, 268 U. S. 510. In that case an injunction was sought against the Governor of Oregon and various other state officials to restrain enforcement of a law requiring parents and others having control of young children to send them to the State's primary schools. Plaintiffs were two corporations owning and conducting private schools. In behalf of the defendants it was contended that the corporations had no right to test the constitutionality of a law merely because it might affect the liberty of others (parents and children) in whom they had no recognized

legal interest. (Similarly, Petitioners here contend that Respondent has no rights of her own involved but appears merely as the champion of the Negro race.) In answer, counsel in the *Pierce* case pointed out that if the liberty of the parents was impaired the constitutional rights of the corporation schools were necessarily abridged, and this position was sustained by the Court.

Obviously, the corporations had no children of their own and therefore the challenged legislation did not directly operate upon them. However, the relation between schools, parents and children being what it is, the corporations' property interests were immediately involved and the Court found that:

> "These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools." (p. 535).

Although the parents were not parties to the action, the Court further found:

> "Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control" (pp. 534-535).

In *Truax v. Raich*, 239 U. S. 33, this Court had under consideration a statute of Arizona requiring employers of more than five employees to employ not less than 80% qualified electors and native-born citizens. Raich, employed as a cook, filed suit against his employer and the attorney general and county attorney, alleging that they intended to prosecute his employer and that to avoid

such prosecution his employer was preparing to discharge him. Here, again, the statute did not in terms apply to the party asserting the unconstitutionality but the Court stated:

> "It is further urged that the complainant cannot sue save to redress his own grievance (McCabe v. Atchison, Topeka and Santa Fe Ry., 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit . . . It is, therefore, idle to call the injury indirect or remote." (P. 38.)

In the same manner, the rights of our Negro citizens cannot be adversely affected without directly affecting the rights of other members of the community. The rights protected by the Fourteenth Amendment include those which are not tangible or corporeal. Thus, in *Sweatt v. Painter*, 339 U. S. 631, the Court found the Negro law school to be unequal to the University of Texas Law School to which only white students were admitted, because the latter possessed *"those qualities which are incapable of objective measurement."* (P. 634, emphasis added.) The Court stressed the importance of "the interplay of ideas and the exchange of views with which the law is concerned" (p. 634).

In defining the rights of residents of a company-owned town, this Court stated:

> "Just as all other citizens they must make decisions which affect the welfare of the community and

nation. To act as good citizens they must be informed. In order to be properly informed, their information must be uncensored."

Marsh v. Alabama, 326 U. S. 501, 508.

A sound system of community relations, which is the only environment in which Respondent's rights can be completely guaranteed, also requires "the interplay of ideas and the exchange of views" between white and Negro. Segregation produces results totally inconsistent with this desired objective.

B. The Right to Dispose of Her Property.

Among the rights guaranteed to Respondent by the Fourteenth Amendment is the right to dispose of her property to a person of color.

Buchanan v. Warley, 245 U. S. 60, 81;

Hurd v. Hodge, 334 U. S. 24;

Phillips v. Naff, 332 Mich. 389, 52 N. W. 2d 158.

It is argued on behalf of Petitioners that this issue is not involved since Respondent "has fully exercised her right to dispose of her property" (Petitioners' Br. p. 27). To assert, however, that one has a constitutional right to dispose of his property to a person of color but that he may only exercise such right by subjecting himself to a suit for damages (as Petitioners contend) is to nullify the right completely. It is obvious that few property owners would be willing to take the risks involved in exercising their constitutional rights to sell to

Negroes under such conditions. The practical result is that their rights are effectively annulled. (*Phillips v. Naff, supra,* p. 401.)

II.

Public Policy of the State of California Inhibits the Use of the State's Courts to Enforce This Agreement.

Although it is clear that such agreements may not contravene the public policy of the State, and therefore voluntary adherence thereto may not be interfered with by the State, the use of the judicial machinery of the State to enforce them violates the public policy of the State.

Similarly, in *Hurd v. Hodge, supra,* this Court reversed the judgment of the United States District Court for the District of Columbia decreeing enforcement of a restrictive covenant. Included as a defendant was Uricolo, *a white real estate dealer,* who had sold some of the properties to Negroes. On certiorari the petitioners in that case contended that this violated the due process clause of the Fifth Amendment. However, this Court did not find it necessary to resolve the constitutional issue. The decision was based upon Section 1978 of the Revised Statutes and the public policy of the United States. It was held that:

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the

public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (Pp. 34-35.)

Although the opinion of the District Court of Appeal of California in the instant case stresses the Fourteenth Amendment, the broad language used therein sufficiently shows that a further ground of opinion was the public policy of the State. Thus, it is declared:

> "No person has the right, nor does the State have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws." (*Barrows v. Jackson,* 112 Cal. App. 2d 534, 554.)

This is particularly true in the light of recent decisions of the Supreme Court of California enunciating a public policy opposed to discrimination on account of race or color.

James v. Marinship, 25 Cal. 2d 721, 740;

Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 286, 290.

In the *James* case, the defendant trade union contended that discriminatory acts of private individuals or organizations were not prohibited by the constitutional provisions, since such provisions were applicable to state action rather than to private action. It further contended

that private acts of discrimination could be prohibited only by state statute and that the existing California statutes forbidding racial discrimination by private persons did not include labor unions. Answering this contention the Court declared, at page 740:

> "The analogy of the public service cases not only *demonstrates a public policy against racial discrimination* but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved." (Emphasis added.)

The doctrine of the *James* case was subsequently reaffirmed in the *Williams* case, where the Court declared, at page 590:

> "Although the relief granted in the *Corsi* case was derived from legislative authority, nevertheless, it is established that, *where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy, the courts have full power to afford the necessary protection in the absence of statute.*" (Emphasis added.)

Inherent in the concept of public policy is the fundamental requirement that the state itself will not lend its assistance to the creation or support of the condition condemned thereby. The public policy of the State of California against discrimination on the basis of color is clear. It necessarily follows, as an element of that public policy, that the courts are closed to those who seek results inconsistent with that policy.

III.

The State Court May Properly Raise an Objection of Public Policy or Constitutional Violation Sua Sponte.

Whether the Court below based its opinion on the ground of the Fourteenth Amendment or on the ground of public policy, it had the power to act on its own motion. This is clearly the law where public policy is involved.

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 267;

Steele v. Drummond, 275 U. S. 199, 204;

Endicott v. Rosenthal, 216 Cal. 721, 728;

17 *C. J. S. Contracts*, p. 670, Sec. 281.

It is also clear that where public policy is concerned, there is no doctrine of estoppel.

Fewel & Dawes v. Pratt, 17 Cal. 2d 85, 91;

Walker v. Harbor Realty & Development Co., 214 Cal. 46, 48;

Doherty v. Bartlett, 81 F. 2d 920, 926, cert. den. 298 U. S. 676;

17 *C. J. S., Contracts*, p. 669, Sec. 279.

Nor can enforcement be secured on the theory of ratification or retention of benefits.

Pacific Wharf & Storage Co. v. Standard American Dredging Co., 184 Cal. 21, 24;

Kessler v. Jefferson Storage Corp., 125 F. 2d 108, 110;

17 *C. J. S., Contracts*, pp. 668-669, Secs. 279-280.

"The rule as to the nonenforcement of illegal contracts is not based upon any consideration for the party against whom the relief is sought, and who may be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. It is not for the sake of a party but for the sake of the law itself, that a court refuses to allow the law to be made use of for the enforcement of illegal contracts, and leaves the parties where it finds them."

6 Cal Jur., Contracts, pp. 153-154, Sec. 107.

This same principle is applicable where the contract itself is illegal *or* where the contract though valid and subject to voluntary adherence is denied judicial enforcement because of the state's general public policy against discsimination.

Where the principle is applicable, it follows that the Court is not concerned with the parties who may be before it in the specific case. The very meaning of public policy embraces the interest of others than the parties.

Beasley v. Texas & P. R. Co., 191 U. S. 492.

Therefore, even if none of Respondent's rights were affected, the Court might properly consider the effect of its action on the Negro occupants who are not before it but are "merely members of a vague and ghostly group" (Br. of St. Louis *Amici,* p. 10). It is completely immaterial that Respondent voluntarily consented to enter into the agreement in question. The Court is not concerned with Respondent alone. It refuses to act *because of a disability in the Petitioner.*

But the Court may also, on its own motion, raise the *constitutional* objection under the same state of facts. In this case the Court is not passing on the constitutionality of a statute enacted by the *legislative* branch of government, *but is being solicited to take affirmative action of its own.* Were the constitutionality of a statute involved we would be governed by the declaration of this Court in *Massachusetts v. Mellon*, 262 U. S. 447, 488.

> "We have no power *per se* to review and *annul acts of Congress* on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of legal rights." (Emphasis added.)

In that case the Court determined that it was being asked

> "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department" (pp. 488-489).

Here, however, no legislative enactment is involved. What Petitioners seek is not the exercise of the "negative power to disregard an unconstitutional enactment" but the affirmative action of the Court in furthering the maintenance of the system of segregation. The situation

is the same as though Petitioners were appearing as lobbyists before the State legislature. It could hardly be contended that the legislature could not reject their unconstitutional demand merely because no Negroes were present in the legislative chamber. Nor is the state court without power to reject their demand merely because no Negroes are parties to this litigation. And in rejecting this demand, the Court is not required "to assume a position of authority over the governmental acts of another and co-equal department" of government.

Even where legislative enactments are involved, in cases involving freedom of speech, this Court has broadly interpreted and applied its powers of review, because of the vital social interest involved. Thus, in *Thornhill v. Alabama*, 310 U. S. 88, the Court held:

> "Proof of an abuse of power *in the particular case* has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165; *Hague v. CIO*, 307 U. S. 496, 516; *Lovell v. Griffin*, 303 U. S. 444." (P. 97, emphasis added.)

The basis of the rule is "an appreciation of the character of the evil inherent in a licensing system" and because the power of the licensor "is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern" (p. 97).

In answer to Alabama's contention that petitioner could not complain of the deprivation of any rights but his own, the Court applied the rule above set forth and proceeded to judge the law on its face.[3]

Conclusion.

Because of the serious social concern with the problem of segregation the Court below properly refused to grant the relief sought by Petitioners. This result is commanded by the Fourteenth Amendment and by the public policy of the State of California. Wherefore, these *Amici Curiae* pray that the judgment of the District Court of Appeal of California be affirmed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
(Southern California Branch),
By A. L. WIRIN and
ABRAHAM GORENFELD,

LOS ANGELES INTERNATIONAL LADIES'
GARMENT WORKERS' UNION,
By BASIL FEINBERG,

GREATER LOS ANGELES C. I. O. COUNCIL,
By FRED OKRAND,

---

[3]The social interest in free speech as a basis of judicial decisions is emphasized by Professor Zechariah Chafee, Jr., *Freedom of Speech in the United States*, p. 34, 1941. See, also, *Day v. Metropolitan Life Ins. Co.*, 11 Cal. App. 2d 681, 683; cert. den. 299 U. S. 560, in which the court indicated that the constitutional questions may properly be considered in any case where "the unconstitutionality of the statute is so apparent on the face that no circumstances can be assumed under which it might have a constitutional operation." And see 16 *C. J. S.*, Constitutional Law, p. 164, as to the present liberal attitude of the courts in permitting the constitutional question to be raised.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
By EVERETTE PORTER,

JAPANESE AMERICAN CITIZENS' LEAGUE,
By SABURO KIDO,

LOS ANGELES URBAN LEAGUE,

SOUTHERN DIVISION, CALIFORNIA COOPERATIVE LEAGUE,

THE CHRISTINES,

JEWISH LABOR COMMITTEE,

LOS ANGELES DISTRICT COUNCIL, JEWISH WAR VETERANS, U. S. A.,

EAGLE ROCK COUNCIL FOR CIVIC UNITY,
By DAVID ZISKIND,

LOS ANGELES CENTRAL LABOR COUNCIL,
By GEORGE E. BODLE,

Counsel for Amici Curiae.